No. 20129 and 20130

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

In the matter of the Petition of AMERICAN MAIL LINE LTD., a corporation, owner pro hac vice of the American Oil Screw ISLAND MAIL, Official No. 241157, for exoneration of liability, et al.

UNITED PACIFIC INSURANCE COMPANY, et al,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANTS

DETELS, DRAPER & MARINKOVICH
JONES, GREY, KEHOE, HOOPER & OLSEN
MARTIN P. DETELS, JR.
HARRY B. JONES, JR.
Attorneys for Appellants

Of Counsel:
BIGHAM, ENGLAR, JONES & HOUSTON
JOSEPH J. MAGRATH
Address:
1134 Washington Building
Seattle, Washington 98101

After April 1, 1966:
1310 IBM Building
Seattle, Washington 98101

FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

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ABBREVIATIONS

App.	-	Appendix
C. G. Tr.	-	Transcript of testimony at Coast Guard Investigation
CR	-	Clerk's Record
FF	-	Finding of Fact
GB	-	Government Brief
MLB	-	American Mail Line Brief
MLLW	-	Mean Lower Low Water
PCB	-	Private Cargo Brief
PTO	-	Pretrial Order
T.	-	True
Tr.	-	Transcript of Testimony

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REPLY BRIEF OF APPELLANTS

I. ARGUMENT

A. Introduction

The Government's posture in this Appeal, as disclosed by its Combined Opening Brief, is inaccurate as to the facts, and erroneous as to the law.

Factually, it distorts the record as to both the CHARLES CROCKER and ISLAND MAIL casualties.

Legally, it asks this Court to:

1. *Ignore or misread Indian Towing Co. v. United States;*

2. *Legislate the "agency discretion" exception of the Tort Claims Act into the Suits in Admiralty Act; and*

3. *Declare the novel principle that a tort-feasor is not liable to an innocent claimant for the latter's full damages if a third party was also negligent.*

This reply brief is organized as follows:

B. Factual Restatement

1. The ISLAND MAIL struck the 3.5 rock and rolled it over;

2. The Government, through both the Coast Guard and the Coast and Geodetic Survey, acted negligently following the CROCKER incident.

C. Applicable Legal Principles

1. The Government, which compels ship operators to purchase and maintain Government-published charts, is liable to innocent cargo for damage resulting from negligence in its compilation of information and publication of such charts.

2. The "Agency Discretion" exception of the Tort Claims Act has no application to this action, under the Suits in Admiralty Act.

3. Under controlling principles of admiralty law the concurrent negligence of Soriano (if he be found negligent) does not relieve the negligent Government of liability to cargo, in whole or in part.

B. Factual Restatement

1. *The ISLAND MAIL struck the* 3.5 *rock and rolled it over.*

Private Cargo reviewed, at pages 15-19, and argued, at pages 43-49, of its Opening Brief, the evidence which, in our submission, compels a finding that the ISLAND MAIL struck the 3.5 rock and rolled it over. (See also Appendix 5 to that Brief.)

The Government, committed to the striking of the 3.5 rock by the ISLAND MAIL by Stipulation in this case, and contention in the *Soriano* case, treats this contention only in footnote 4 on page 84 of its 115-page brief, stating:

> "The Government does not utilize space in this brief to delineate the improbability of the 3.5 rock having been rolled over by the ISLAND MAIL."

Since the District Court variously described this contention of Private Cargo as "the most probable possibility" (Tr. 1138) and as "convincing and plausible" (Tr. 1143), the Government's space-saving but cavalier treatment of the point invites closer scrutiny.

The Government contended below (PTO, CR 36, Par. 1) that the ISLAND MAIL struck the 3.5 rock, and in its appeal against Soriano it assigns error to the District Court's failure to so find (Specification of Error 6, GB 57). It argues this contention at pages 77-82 of its Brief. It avoids recognition that rolling of the rock by the ISLAND MAIL would fully explain contact between vessel and rock and instead attempts to lead this Court into the realm of metaphysics.

> ". . . [T]hough the exact mechanics of the striking are not known . . . how the rock was hit is not important as long as the ultimate fact that the rock was hit is established . . ." (GB 78)

It goes on to concede that even the maximum sinkage figure of 2'8" testified to by its witness Beal[1] would not close the gap between the rock (as it lay after the ISLAND MAIL casualty when found by divers) and the point of impact on the ISLAND MAIL, three feet above the keel. It suggests, however, that this Court should find the sinkage of the ISLAND MAIL to have been greater than the maximum figure mentioned in the evidence which it offered to the District Court, which evidence that Court declined to receive for any purpose (Tr. 349).[2]

Not content with this effort to close the gap by reliance on excluded testimony, at GB 80 it represents to this Court that Beal testified that passing over the 3.5 rock would increase the sinkage of the vessel. The experiments (with dissimilar hulls) on which Beal predicated his testimony were performed in a model basin having a smooth bottom (Tr. 334). Beal was not asked (and did not testify) what, if any, effect the passage of a vessel over a pinnacle rock would have on sinkage. The three record references cited by the Government on page 80 of its brief for the assertion that passage over a pinnacle rock would increase sinkage (Tr. 321, 315, 324-325) refer to the effect proceeding into shallower water would have on sinkage. Since the 2'8" figure testified to by Beal as maximum sinkage of the ISLAND MAIL was related to "running in 36 feet of water for . . . approximately a half a mile" (Tr. 321), and it is clear that the ISLAND MAIL

1. And set forth in its Answers to Interrogatories. Tr. 339.

2. Private Cargo takes vigorous exception to the Government's repeated reliance on testimony which was either excluded or admitted for a carefully limited purpose. See also, pp 8, 9 of this Brief.

did not run in 6-fathom water for any such period of time (see, e.g., GB App. 3), even the 2′8″ opinion figure was unsupported by the factual evidence. The effort to urge this Court to assume even greater sinkage is a measure of the Government's desperation in refusing to accept the inescapable conclusion that the rock was rolled by the ISLAND MAIL, and that it previously stood in a position in which contact with both ISLAND MAIL and CROCKER would occur.

We reproduced, in Appendix 5 to our Original Brief, a sketch presented to the District Court which demonstrates the impossibility of contact between ISLAND MAIL and rock in its present attitude, and the complete consistency of contact by both ISLAND MAIL and CROCKER with the rock, if it was rolled by the ISLAND MAIL.

The impossibility of contact between ISLAND MAIL and rock in its present attitude is illustrated with equal clarity in App. 1 to the *Soriano* brief.

When it is recalled that the Mate, Gunderson, felt the ISLAND MAIL had rolled something over (testifying in the Coast Guard hearing before the 3.5 rock was found by divers) (C.G. Tr. 286-7), this "most probable possibility" (Oral Opinion, Tr. 1138), becomes an inescapable conclusion, at least as between parties agreeing that the ISLAND MAIL struck the rock.

The Government, in its further effort to close the vessel-rock gap without accepting the only rational explanation thereof—rolling of the rock—urges the Court to do so: (1) by speculating as to pitch; and (2) by attempting to impeach the Tide Tables, Ex. 58, and the District Court's Finding of Fact 5 (Tr.

146-147) (which the Government prepared) that the tide at the time and place of the casualty was 5.4′ above MLLW; and (3) by attacking (without any contrary evidence) the District Court's finding that the initial point of impact between ISLAND MAIL and rock was 3′ above the keel at Frame 159 (FF 43, Oral Opinion, Tr. 1136).

Most significantly, the Government's brief evades any explanation of how, if the rock was in its post-ISLAND MAIL posture when first struck by the ISLAND MAIL, the easterly side of the rock came into contact with the starboard side of a northbound vessel, although the District Court found that, if the rock was rolled over from west to east, ". . . the areas of damage to the vessel would be consistent with the marking noted on the south side and the easterly portion of the top of the rock." (FF 43, Tr. 1138).

The poverty of the Government's position, in urging, as against Soriano, that this Court must find that the ISLAND MAIL struck the 3.5 rock—a fact stipulated between Private Cargo and Government —while refusing to concede (or even discuss) that the rock rolled, (a contention the District Court found "plausible and convincing") illustrates, better than further argument by Private Cargo could hope to do—why this Court should find that the rock was rolled.

We welcome, however, the Government's recognition, at least when it is arguing as appellant against Soriano, that a fact may be established by "a showing of reasonable probabilities" (GB 78, 81). We leave it to this Court to determine whether rolling of the rock is a more reasonable probability than

the *only other* Government suggestion to explain contact between rock and vessel—i.e., greater sinkage than the maximum testified to by its own expert, *plus* a smaller tide than shown by Ex. 58 and found by the District Court, *plus* a point of initial impact on the hull of the ISLAND MAIL deeper than testified to by any witness or found by the District Court, *plus* pitching of the vessel, of which there was no evidence whatever.

Independently of the Private Cargo-Government stipulation, the evidence compelled a finding that the ISLAND MAIL struck the 3.5 rock and rolled it over. As between parties to that stipulation, no other conclusion is permissible.

2. *The CROCKER struck the* 3.5 *rock in* 1952.

The Government devotes 30 pages of its Statement of the Case (GB 3-32) to the CROCKER incident, in an endeavor to support the District Court's finding that the CROCKER did not strike the 3.5 rock. Its position is based on the following three premises:

(a) Commander Conway plotted the information obtained by him from the Second Mate Burris and Helmsman Johnson of the CROCKER to give a distance off Smith Island Light of 1.6 miles;

(b) Coast and Geodetic Survey witness Edmonston "determined" (GB 16), by comparison of fathometer soundings with the hydrography that the track of the CROCKER was 1.6 miles off Smith Island Light;

(c) There were "hundreds" of other rocks in the area, some one of which the CROCKER struck.

Not one of these premises is supportable under the facts in evidence.

(a) *Conway's "evidence."*

Commander Conway did not testify that he determined the point of striking of the CROCKER, but rather confessed that he could not do so, although he concluded it was within the 10-fathom curve west of Smith Island (Tr. 1053-55).[3]

His testimony was largely concerned with the hearsay relation of what the *ex parte* statements to him of the Second Mate and Helmsman of the CROCKER had been, some twelve years before, in an investigation in which none of the parties to this litigation, except the Government, was represented. Burris and Johnson were not called at the trial of this case by the Government, and were never subject to cross-examination on behalf of Private Cargo (or Mail Line or Soriano). Thus, the District Court properly ruled that Conway's testimony was not admissible on the issue of where the CROCKER striking occurred (Tr. 1023, 1029, 1030). In fact, at trial Conway's hearsay testimony was not offered by the Government for the veracity of what members of the CROCKER crew had said (Tr. 1023, 1029). Private Cargo pointed out, in its Opening Brief, the limitation placed on the offering and receipt of this portion of Conway's testimony (PCB

3. "I could not ever deduct where it grounded." (Tr. 1054) "I could go up and make an arc in my own mind and my recollection would put it in several areas where it could have been." (Id.)

22, f.n. 11; 51). The Government's brief nowhere recognizes that this testimony was offered and received for a limited purpose, and the Government clearly invites this Court to consider it on the issue of where the CROCKER struck, as it must since the District Court's finding that the CROCKER did not strike the 3.5 rock is otherwise unsupportable. If there is some legal precedent for this extraordinary invitation, the Government's brief does not supply it. We know of none.

Conway's "hearsay" plot of the hearsay evidence of Burris stands on still poorer footing, as to the issue of the location of the CROCKER casualty, than Conway's hearsay testimony itself. As pointed out in our Opening Brief, Conway's plot which placed the CROCKER'S track 1.6 miles off Smith Island Light, based on his hearsay testimony as to Burris' *ex parte* statements, contained a plotting error, in that he laid off a course of 339° T intersecting Cattle Point Light rather than 340° T, the bearing actually stated by Conway as given him by Burris. The effect of this plotting error, perhaps unintentional, was to place the CROCKER closer to the Light than the hearsay testimony itself. Conway himself testified that he had plotted it several times, and "it usually has been 1.7 [miles]" (Tr. 1051). In point of fact, accurate plotting of a course line of 340° T intersecting Cattle Point Light would leave Smith Island Light 1.75 miles abeam. While criticizing us for inviting the attention of this Court to that error (as we invited the attention of the Court below to it—Tr. 1121-48), the Government's Brief does not deny that Conway's plotting

was defective. (GB 9). It cannot do so. The exhibit (40A) is before the Court.[4]

Indeed, the Government itself now plots Conway's version of Burris' testimony as 1.7 miles off Smith Island Light (GB App. 3) although it mislabels that course track as "CN 340 CROCKER (Burris) 1.7 miles." Burris, of course, did not testify.

There is no support for a finding that the CROCKER casualty occurred 1.6 or less miles west of Smith Island Light in either the hearsay testimony or the hearsay plotting of Conway.

(b) *Edmonston's testimony.*

The Government's brief repeats, in numerous verbal formulations, the unsupported assertion that Edmonston "determined" that the CROCKER casualty occurred 1.6 miles off Smith Island Light. Edmonston did not so testify. His examination with reference to the CROCKER'S fathometer readings was confined to the consistency or inconsistency of such readings with the hydrography at various distances off the Light. He did eliminate 2.2 miles off as inconsistent. He testified that, at 1.6 miles, the soundings were "fairly consistent" with the hydrography (Tr. 1106), and that, at 1.8 miles, they were not too inconsistent (Tr. 1108). No claim to having determined the location or distance of the CROCKER striking was made by Edmonston, and no amount of Government repetition that he made

4. The Government also criticizes our use of a post-ISLAND MAIL chart (showing the 3.5 rock) for Appendix 4 to our opening brief (GB 10) in view of the change in the position of Smith Island Light. The only position charted thereon by reference to a Smith Island Light is "281° two miles from the Light," and it was plotted in relation to the 1952 position of the Light.

such a determination can supply this lack of testimony.

A further comment on Edmonston's "hydrographic study" should be made. He was instructed as to the courses and speed of the CROCKER he was to assume, and asked to compare the hydrography at a distance of 2.2 miles off at Tr. 1044—*after* Court reconvened at 1:30 p.m. on the last day of testimony. At Tr. 1051-1052 he was asked to make a second comparison at 1.6 miles. His testimony as to those distances commenced at Tr. 1090 (a few minutes *after* 3:00 p.m.—see Tr. 1087). He was excused at Tr. 1110. Court adjourned at 3:58 p.m. (Tr. 1116). Prior to Tr. 1107, he had not checked any distances except 1.6 and 2.2 miles. His comparison at 1.8 miles begins at Tr. 1107 and ends at Tr. 1108, a brief interlude in the court session of 58 minutes in which 26 pages of transcript were taken, from 3:00 p.m. to 3:58 p.m.

The extent of the allowable limits of advocacy is a somewhat subjective matter. Clearly, however, such limits were closely approached, if not exceeded, by the sweeping claims of the Government's brief as to the testimony of Edmonston. Representative are the following excerpts from its brief:

> "the 1.6 mile hydrographic determination [of Edmonston]" GB 16
>
> "the 1.6 mile determination of Edmonston" GB 16
>
> "In sum, proctors for Private Cargo were unsuccessful in attempting to make . . . a trained hydrographer . . . interpret the Flint soundings as indicating that the CROCKER was at a greater distance than 1.6 miles from Smith Island Light at the time of her casualty." GB 17

Had Edmonston testified that, in his opinion, the CROCKER casualty occurred 1.6 miles or less westerly of Smith Island Light—and he did not—he would have been subject to vigorous cross-examination as to the basis for such an opinion, based on widely-spaced (250 to 290 feet—GB 43, 44) fathometer soundings recorded in the hydrographic surveys at 20-second intervals by vessels not on the course track of the CROCKER. Neither the Government, which produced Edmonston as a witness, nor the District Court, which examined him as to "consistency" of the fathometer readings with the hydrography, asked Edmonston to position the CROCKER at the time of her casualty. The farthest limit of his testimony was that the 1.6 mile distance was "the most consistent" *of those that he had been requested to review,* although 1.8 was not too inconsistent (Tr. 1108), and Edmonston admitted that west of the 1.6 mile track the soundings were "rather consistent." (Tr. 1103-4)[5]

Edmonston's comparisons made no allowance for sinkage of which the Government makes much in its appeal against Soriano. Sinkage of the

5. The Government criticizes (GB 13), the table appearing on page 27 of our Opening Brief, setting out Edmonston's comparison of the pre-striking fathometer readings with the depth datum. The figures used are taken verbatim from Edmonston's testimony at Tr. 1099 and show that all pre-striking fathometer readings showed water deeper than that shown on the chart at the 1.6 miles distance. The Government's tabulation (GB 14) conspicuously omits a comparison of the 1402 fathometer sounding (the starting point for the comparison), 11¾ fathoms, with the depth datum, while including the post-casualty soundings made at 1407 and 1408 following a hard left turn and impact, when course and speed of the CROCKER were unknown, and Edmonston himself testified that his assumed track of the CROCKER was "arbitrary" and that he didn't "know how accurate they were." (Tr. 1091)

CROCKER would require further correction of her fathometer soundings by decreasing the actual depth of the water under her oscillator, and would thus require shifting of Edmonston's overlay further west, into somewhat deeper water, to produce the same order of consistency. For example, allowance of 2 feet for sinkage of the CROCKER, would require increasing all adjusted fathometer readings of the CROCKER (presented in Ex. 14 PCB A-8) by ⅓ fathom.

(c) *The "hundreds of rocks."*

Confronted with the necessity of denying that the CROCKER struck the 3.5 rock, and the utter absence of any other possible rock as a candidate for the CROCKER casualty, the Government obliquely suggests that there were "hundreds of rocks inside the 10-fathom curve . . . readily available within the Smith Island Shoal" (GB 72). There is nowhere else in its brief any mention of the undeniable fact that the CROCKER struck a rock, and that no rock, other than the 3.5 rock, has ever been found (much less charted) by diving, wire-dragging or hydrography, which could, by even remote possibility, have been struck by the CROCKER.

The Government's explorations disclosed only one other rock—the so-called "4-fathom rock", at a distance of approximately 1.6+ miles from the Light. At the plus 4.5′ stage of tide at the time of the CROCKER casualty, 29.5′ was the least depth of water over the top of that rock. The Government does not suggest the CROCKER hit this rock, and the District Court, in a finding not attacked by the Government, specifically found that the CROCKER did not strike the 4-fathom rock. (FF 38, CR 158).

There is a kind of consistency, perhaps, in the Government's factual posture. Confronted with the fact that Conway's hearsay testimony as to the *ex parte* statements of some CROCKER crew members was not offered and not received on the issue of the location of the CROCKER casualty, it ignores the terms of its offer of such testimony and the District Court's evidentiary ruling, and argues such testimony to this Court *in extenso*. Confronted with the fact that Edmonston was not asked, and did not purport, to determine the location of the CROCKER casualty, it repeatedly insists that he did. Confronted with the absence of any rock, other than the 3.5 rock that the CROCKER could, by any possibility, have struck, it speaks of "hundreds of rocks."

The wire-dragging operation did not everywhere extend to or inshore of a 1.6 mile radius from Smith Island, but as Appendix 3 to the Government's Brief shows, it did extend to within 1.5 miles of the Light for approximately 5° to either side of the 281°T bearing reported by Flint.[6]

In the years from the CROCKER casualty to date, no rock other than the 3.5 rock, which the CROCKER could have struck has been discovered, much less charted. To speak of "hundreds of rocks", as does the Government, proves, on close examination, a confession of its inability to specify even a single other possibility. Nothing Private Cargo can say more eloquently demonstrates the certainty that the CROCKER struck the 3.5 rock than the Government's studied avoidance of the only rational

6. And Flint's bearing (as contrasted with his distance) from Smith Island is nowhere impeached by testimony, hearsay or otherwise. This bearing passes approximately one ship-length from the 3.5 rock.

explanation of the ISLAND MAIL having struck the 3.5 rock—the roll over. The District Court's finding that the CROCKER did not strike the 3.5 rock (FF 38, CR 158) was clearly erroneous.

3. *The Government Was Negligent.*

The District Court found the conclusion that "the Government was negligent, perhaps grossly so" "inescapable" (FF 43 Oral Opinion, Tr. 1142). The factual basis for this finding was fully discussed at pp 30-38 of our Opening Brief, and in this reply brief we merely point out wherein the Government's treatment of this issue is inaccurate or misleading.

At GB 23, it is stated that the District Court found that the 90-minute patrol boat "search" "was in all respects proper." The statement omits the important qualification contained in the District Court's actual finding (FF 35, CR 157) that "the action taken by the Government, *based upon Captain Flint's original radio message and his original official report Form No.* 2691 of Marine Casualty, was in all respects proper." [Emphasis supplied] Nothing whatever was done by the Government when it learned at Portland in July, 1952 (1) that the CROCKER had struck not wreckage, but a rock; (2) that the least depth of water over that rock at MLLW was approximately 17.5 feet; and (3) that the fathometer soundings reported by the vessel gave reason to believe that the position of the casualty was easterly of the position originally reported to it (and still further east of the position it erroneously published in the Notice to Mariners and then charted).

At GB 104, the Government states that the District Court "determined that Commander Conway

had performed his duties properly." The finding cited, FF 41 (CR 159) is as follows:

> "The fault within the Government was not the fault of any one person in not doing something he should have done or in failing to carry out his duties, but basically a fault of the Government to formulate a plan for the coordination and dissemination of information."

The Government's claim for this finding is perhaps arguably fair, but it is hardly the ringing endorsement of Conway which its brief intimates.

In point of fact, the Coast Guard through Conway knew in July, 1952, every circumstance surrounding the CROCKER incident which was known at trial—except the results of the Government's 1961 diving, wire-dragging and hydrographic operations. Conway knew the CROCKER had struck a rock, not wreckage, contrary to the original report and the Notice to Mariners; he knew the CROCKER had a mean draft of 21'11", and that the rock struck had a least depth of water over it, at MLLW, of approximately 17.5 feet; he knew (or *says* he knew) it was inshore, or easterly, of the position reported by Flint, as well as of the position published in the Weekly Notice to Mariners and charted by the Coast and Geodetic Survey; he knew that the "Wreckage Rep." legend which the Notice stated would be placed on the charts was based on information both incorrect as to location and type of obstruction, and incomplete in that it gave no notice that it had been struck by a surface-navigating vessel, or as to the depth of water over it; he knew that the Government's charts showed no rock which the CROCKER could have struck anywhere between Captain Flint's reported position, and his own plot for the vessel's

track, *or* for a considerable distance inshore of the latter track.

In the light of this evidence as to Conway's knowledge, and the fact that he was under instruction to report "if something isn't right", to the Coast and Geodetic Survey, the District Court's finding that the Government's negligence was in its failure "to formulate a plan for the coordination and dissemination of information" (FF 41, CR 159) was clearly erroneous, if construed to mean that Conway was not negligent in failing to act in view of the knowledge he had and his instructions.

C. Applicable Legal Principles

1. *The Government is liable for damage resulting from negligent publication of Official Charts.*

The Government's characterization of Private Cargo's legal contentions is hardly designed to place the issues of the case in focus for consideration by this Court. Private Cargo, says the Government, is seeking to impose ". . . liability on the United States for the actions of a pilot over whom the Government had no control." (GB 88).

Of course no contention has been or will be made that the Government is liable for the negligence of Soriano.

Elsewhere it is urged, presumably in response to some contention of Private Cargo, that:

> "There is no legal duty imposed on the Government to search for non-existent rocks in territorial waters of the United States or to remove from charts an official report made by the Master of a vessel and confirmed by his sworn testimony that he struck an obstruction at a defined location." (GB 83)

The first curious thing about the quoted statement is the reference to a "non-existent rock". The 3.5 rock exists—the Government contends and has stipulated that the ISLAND MAIL struck it, and the evidence compels a finding that the CROCKER struck it. It is only the rock, or one of "hundreds of rocks", which the Government contends the CROCKER struck, which is non-existent.

More remarkable, however, in the light of the *Indian Towing* case, is the assertion that the Government has no duty to "remove from charts an offical report made by the Master of a vessel and confirmed by his sworn testimony that he struck an obstruction at a defined location," if this assertion is intended to have application to the circumstances of this case.

The Government did not put the Master's report, or any reasonable interpretation thereof, on its charts. Rather, it charted it inaccurately as to latitude and longitude, and not at all as to depth. A nautical chart is a two-dimensional representation of data as to three dimensions—latitude, longitude, and vertical relationship to mean lower low water. The Weekly Notice to Mariners was inaccurate as to both latitude and longitude, and entirely silent as to depth, giving no notice even that the reported object had been struck by a surface-navigating vessel. For all that was stated, the object had been snagged by a bottom-fishing net, or found by recreational divers or a submarine. The charts, prepared by the Coast and Geodetic Survey, which had no information except the Weekly Notice to Mariners, and asked for none, was likewise inaccurate as to longitude and latitude, but rather than being silent as to depth, as was the Notice, the charts were af-

firmatively misleading on that critical point, as the testimony of Edmonston revealed beyond possibility of argument. ("In looking at the chart today, I see twenty fathoms of water in the area.") (Tr. 969).

Moreover, unless the Government is somehow precluded from ever changing or supplementing the first report of a Master in the preparation of its charts, it should have corrected the "Wreckage" legend to a rock symbol when drydocking of the vessel established that the CROCKER had struck not wreckage but a rock.

Finally, it is clear that the Government places no such sanctity as the quoted statement implies on the reports it receives from Masters of vessels. It received evidence—the fathometer data—which disclosed, it now says, the inaccuracy of Flint's report —and it obtained other information on the basis of which it charged Flint with negligence and reprimanded him "for failure to take bearings" (Conway, Tr. 1061).

Under statutory authorization to provide charts for safe navigation of marine commerce (33 U.S.C. A. § 883a), the Government placed incomplete and inaccurate information on its charts, which, under statutory authorization to promulgate regulations for the safety of life and property at sea (14 U.S.C.A. § 2) it compelled shipowners to purchase and have available aboard their vessels at all times (46 Code of Federal Regulations § 97.05-5). These statutes and regulations are printed in PCB App. 1, pp A-1, A-3 and A-6. Upon learning that some of the information on the charts was definitely inaccurate and concluding that the balance was also inaccurate, the Government did nothing.

The fact that the statutory language authorizes, rather than directs the activities of the Coast Guard and Coast and Geodetic Survey which are here at issue, can hardly avail the Government, after *Indian Towing Co. v. United States,* 350 U.S. 61 (1955), which is completely dispositive of the Government's argument that it had no duty of care in the publication of charts or information to mariners (GB 88-91). *Builders Corporation of America v. United States,* 320 F. 2d 425 (9th Cir. 1963) and cases like it, are inapposite to the situation here presented where, as in *Indian Towing,* the Government has exercised the authority conferred by statute and "engendered" (in this case, "compelled" by exercise of its regulatory power) reliance. Naturally, in its discussion of duty, the Government does not discuss *Indian Towing.*

When the Government does discuss *Indian Towing* (GB 93-94), it is solely to categorize it as a case concerning responsibility of the United States in connection with "Government-owned" aids to navigation. If the Government perceives a legal distinction between a structure erected by it as an aid to navigation and a chart published by it as an aid to navigation, under which it is liable for negligence in the maintenance of the structure, but not liable for negligence in the preparation of the chart, it fails to enlighten this Court as to the rational basis for the distinction. We can conceive of none.

While not binding on this Court, the decision in *United States v. Gavagan,* 280 F.2d 319 (5th Cir. 1960) cert. den. 364 U.S. 933 (1961), in which liability was imposed on the Government for negligent conduct of Search and Rescue activity, because it had undertaken to perform such activity, shows

that there can be no rational distinction as to liability based on the presence or absence of a "Government-owned" structure. The Government does not attempt to explain or distinguish *Gavagan,* discussed by Private Cargo at PCB 64. It does not cite or discuss it.

The Government does attempt to deal at GB 95 with *Pioneer Steamship Co. v. United States,* 176 F.Supp. 140 (E. D. Wis. 1959), discussed at PCB 61-63. It explains the imposition of liability in that case as being based on the Government's original ownership of the offending underwater obstruction. Private Cargo quoted at length from the decision, and repeats briefly here, as follows:

> "Defendant failed to exercise reasonable care when it did not ascertain the location of this possible hazard with any degree of certitude by further inquiry of the vessels in question [those reporting strikings in the area] and when it did not employ appropriate means to determine the potential existence thereof." *Pioneer v. U.S.*, supra, at 147.

The *Pioneer* court specifically excluded Government ownership of the structure as the basis for decision, saying ". . . defendant did not create the hazardous condition by its own act . . .", Ibid, at 146. Ownership was immaterial in *Pioneer,* and non-ownership is immaterial here.

At GB 97, the Government cites *Wheeldon v. United States,* 184 F. Supp. 81 (N. D. Cal. 1960) and other cases, for the proposition that it has no duty to take any action with respect to obstructions it does not own. The holding of that case was that the Government was under no liability, under the Tort Claims Act, for failure to mark a wreck, for

the reason that a private owner would have no liability for failure to do so after abandonment. A clearer refutation of the Government's attempted distinction of *Pioneer v. United States, supra, Otness v. United States,* 178 F. Supp. 647 (D. Alaska 1959) and *Everitt v. United States,* 204 F. Supp. 20 (S.D. Tex. 1962)—that liability was imposed because of Government ownership of the offending obstruction—could hardly be imagined. None of those cases, or *Indian Towing,* rests on Government ownership.

Nor is the Government's position aided by the two cases, one British and one Canadian, cited in the footnote at GB 90. *Candler v. Crane, Christmas & Co.,* (1951) 2 K.B. 154 involves the liability of an accountant for a negligent audit. As its brief discussion of *Iron Ore Transport Company Limited v. Queen,* (1960) Can. Exchequer Court Reports 448, suggests, the principal issue was the obligation of the Crown to maintain a shipping channel—no contention was made that the Crown had been put on inquiry as to the existence of an obstruction.

2. *The "Agency Discretion" exception of the Tort Claims Act has no application to this action, under the Suits in Admiralty Act.*

At GB 103, the Government argues, primarily from Tort Claims Act cases (*Dalehite v. United States,* 346 U.S. 15 (1953); *Builders Corporation of America v. United States,* 320 F.2d 425 (9th Cir. 1963)) that the "agency discretion" exception is available to it here. While urging that the negligence shown cannot be tortured into the "agency discretion" mold, Private Cargo maintains that defense has no application in a Suits in Admiralty Act proceeding as here, and that cases under the

Tort Claims Act are irrelevant. The "agency discretion" exception, specifically incorporated in the Tort Claims Act, is not found in the Suits in Admiralty Act. Rather, the latter states that actions thereunder "shall be heard and determined according to the principles of law . . . obtaining in like cases between private parties . . ." (46 U.S.C. § 743). A clearer legislative direction that common-law notions of sovereign immunity were not to be preserved is difficult to imagine. The Supreme Court itself has rejected efforts of the Department of Justice to narrow Congressional waivers of sovereign immunity. *United States v. Muniz,* 374 U.S. 150, 166 (1963) (cited at PCB 60, on this precise point, but not discussed in the Government's Brief).

The Government remarks on the small number of cases cited by Private Cargo. GB 87. We remark on the Government's failure to distinguish or even discuss some of that small number as well as its ostrich-like treatment of *Indian Towing* and *Pioneer,* and on its labored argument directly contrary to the statements in *Muniz* and *Rayonier* that:

> "There is no justification for this court to read exemptions into the Act [Federal Tort Claims Act] beyond those provided by Congress." (p 166, *Muniz,* and p 320, *Rayonier*)

Surely there is no better justification for imparting exemptions under the Suits in Admiralty Act.

Indeed the Government's brief is noteworthy for its reliance upon the older as opposed to the more recent decisions of the Supreme Court in the field of governmental liability in tort. While we dispute the over-all contention by the Government that the attempt here is to establish a novel and exotic

theory of liability (not since *Indian Towing,* at least) we are aware that in *Muniz* the Court said:

> ". . . the Government's liability is no longer restricted to circumstances in which Government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well. *Indian Towing Co. v. United States,* 350 U.S. 61; *Rayonier, Inc. v. United States,* 352 U.S. 315." (p 159)

At GB 103-108, the Government urges, in support of the decision below, a "close corollary" of the "agency discretion" exception—Government immunity from liability for acts of Government employees involving judgment or discretion. The Government's Contentions of Law, in the Pretrial Order, asserted no such defense, although the claim of "agency discretion" was set forth, somewhat uniquely, as a denial of the District Court's jurisdiction (CR 40-41; Par. 5(4)). What has been said as to the "agency discretion" defense would be dispositive of this appellate afterthought as well.

Also relevant is *Somerset Seafood Co. v. United States,* 193 F. 2d. 631 (4th Cir. 1951) in which the Government, having undertaken to mark a wreck, was held liable for negligence in doing so. "There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger." Id. at 634. See also, *United Air Lines Inc. v. Wiener,* 335 F. 2d 379 (9th Cir. 1964) and *Wenninger v. United States,* 234 F. Supp. 499 (D. Del. 1964) stating that, once the Civil Aeronautics Authority has determined that it will issue Notices to Airmen (NOTAMS), warning of flying hazards, "its determination that

a NOTAM should or should not be issued in a particular case was a discretionary decision at the operating level and beyond the jurisdictional exceptions [of the Tort Claim Act]." (Ibid, 504)

3. *A tort-feasor is liable to an innocent claimant for the latter's full damages, although a third party was also negligent.*

At GB 111-112 the Government urges that if "both Soriano and the United States are found to be negligent, the United States is liable only for half damages to Private Cargo."

Not one of the fourteen cases cited by the Government in this section of its brief contains any authority, *dictum* or otherwise, for the unique proposition thus advanced.

As far as our research discloses, this contention was last advanced by a litigant in admiralty 90 years ago, in *The ATLAS,* 93 U.S. 302 (1876). There, cargo aboard a barge in tow by the tug KATE was lost as a result of collision between KATE and ATLAS. Cargo libelled ATLAS only. The District Court held the collision to have been caused by mutual fault of KATE and ATLAS and awarded Cargo only half damages against ATLAS. The Supreme Court reversed, holding innocent Cargo entitled to full damages against ATLAS, notwithstanding fault of KATE, stating as follows:

> "Parties without fault, such as shippers and consignees, bear no part of the loss in collision suits, and are entitled to full compensation for the damages which they suffer from the wrongdoers, and they may pursue their remedy in personam, either at common law or in the admiralty, against the wrongdoers or any one or

more of them, whether they elect to proceed at law or in the admiralty courts." 93 U.S. at 319.

None of the cases cited by the Government is in any way concerned with the rights of an innocent claimant against one of two or more tort-feasors, and none questions the holding in the ATLAS.

The WONDER, 79 F. 2d 312 (2nd Cir. 1935) is, however, instructive. There, a tug owner libelled the City of New York, as owner of an underwater cable. The City impleaded the contractor who had contracted to install the cable and the latter impleaded the subcontractor who performed the work. From a decree awarding full damages to the libelant against the City, the latter appealed. The Court of Appeals held City and subcontractor to be joint tort-feasors, and modified the decree to allow the City to recover from the subcontractor half of the damages awarded against the City to the libelant.

We state unequivocally that no case cited by the Government involves, directly or indirectly, the contention made in this section of its brief.

Somerset Seafood Co. v. United States, 193 F. 2d 631 (4th Cir. 1951) is apparently considered the most applicable decision, since the Government cites it twice although without discussion of the specific holding, and without any purpose signal for such citation. Somerset sued the United States to recover for loss of its vessel, alleging that the Government had been negligent in the marking of a wreck. The Court of Appeals held that Somerset's vessel, THE ANDERSON, had been negligently navigated into collision with the wreck; that the United States had been negligent in marking of the wreck; and that Somerset was entitled to half-dam-

ages. We leave it to the Government to explain, if it can, how that or any of the other cases cited in the paragraph beginning at the bottom of GB 111 support its assertion that it is not liable here to innocent cargo. The cited section of Gilmore & Black, THE LAW OF ADMIRALTY, § 7-17, reiterates the familiar American rule of divided damages between tort-feasors in mutual fault cases. The rights of innocent cargo are not discussed.

The cases cited in the first full paragraph beginning on GB 112 are restatements, in various factual settings, as to the plasticity of admiralty practice. Typical is *The DUKE OF YORK—HAITI VICTORY,* 354 U.S. 129 (1957), which holds that a District Court, sitting in Admiralty has jurisdiction, in a limitation proceeding, to determine a cross-claim by the petitioner against a claimant, and cross-claims between claimants. None of these cases stands for the Government's proposition, or even discusses any such contention.

IN REPLY TO BRIEF OF APPELLEE AMERICAN MAIL LINE, LTD.

II. ARGUMENT

The principal issue on this appeal can be stated as follows:

> If, as the District Court found, the 10-fathom curve west of Smith Island is "a definite warning of danger" (FF 15, Tr. 149), is a vessel not equipped with an operable fathometer, sea worthy for the purposes of a passage in that area?

Mail Line makes much in its brief (MLB 23) of the inconsistency between the position adopted by Private Cargo in its appeal against the Government and our position in the appeal against Mail Line.

The claimed inconsistency is between our contentions, in the Government case: that the 10-fathom curve was not a definite warning of danger; that the Government's publications indicated adequate depths for safe passage of ISLAND MAIL on the outer or westerly edge of the curve; and that Soriano was not negligent in navigating the ISLAND MAIL on a track over the 3.5 rock, and our contention against Mail Line, that the ISLAND MAIL was unseaworthy because her fathometer was not operable.

That these positions are inconsistent we fully concede, but the inconsistency is that of the District Court, which found, on the one hand, that the 10-fathom curve was a definite warning of danger; and that penetration of it was negligence on the part of Soriano (except in the Government-Soriano case), and on the other hand, that ISLAND MAIL was seaworthy, although the only instrument capable, as a practical matter, of reporting immediately and continuously the depth of water under her keel was inoperable.

Private Cargo attacks the finding that the 10-fathom curve was a "definite warning of danger". (Specification of Error 16, PCB 42). That finding is essential to the position of the Government in the Private Cargo-Government appeal, since Conway's claimed justification for inaction to correct the erroneous and misleading information published by the Government is based on the contention that it

would be negligence for a navigator to penetrate the 10-fathom curve.

If, but only if, this finding that the 10-fathom curve was a definite warning of danger is affirmed, does seaworthiness require that the fathometer be operable.

Neither the District Court's opinion, nor the brief of Mail Line purports to explain how the seaworthiness of a vessel with an inoperable fathometer can be maintained concurrently with a finding that penetration of the 10-fathom curve, a "definite warning of danger", is negligence.

The evidence is undisputed that a fathometer, and only a fathometer, was capable of giving immediate and continuous readings as to the depth of water under ISLAND MAIL's keel and thus warning as to its full-speed penetration of the 10-fathom curve. A sounding machine cannot do this. A sounding machine can only give one reading at a time and the lead must be reeled in to observe the tube in order to actually obtain a reading. Before another sounding can be taken the glass tube must be recoated, if it is a chemical type tube, or cleaned and allowed to dry, if it is a ground-type tube. A sounding machine is a substitute for the deep-sea lead and is located on the exposed deck where its boom can be swung over the side of the ship. It is not located in the pilothouse and it cannot be directly observed by the navigating personnel. It is not a substitute for a fathometer. On the contrary, most soundings are now made by means of a fathometer. (Exhibit 55, *Bowditch* pp. 132-133).

The capability of a fathometer was directly illustrated by the testimony at trial. When the fatho-

meter of the CROCKER indicated 3½ fathoms under the keel, Captain Flint immediately ordered hard left, knowing his vessel was in insufficient water (Ex. 14; PCB App. 2). Had a fathometer been available and used on the ISLAND MAIL it would have given immediate indication that the vessel had penetrated the 10-fathom curve. Pilot Soriano intended to remain seaward of the curve, and believed he was seaward at the time of the ISLAND MAIL casualty. (Tr. 64-66). An operable fathometer would have given Soriano immediate information that he was inshore of his intended track. Any vessel response whatever to a helm order for left rudder would have avoided the 3.5 rock.

At MLB 24, Mail Line argues the lack of evidence as to proximate cause. It recites that two witnesses, Lindholm and Hare, made no reference to a fathometer. They were not asked. Einmo would have used the fathometer (Tr. 365). Smith and Curry did not think it was necessary in that area, but they did not regard the 10-fathom curve as a warning of danger (Tr. 768, 834), a position which the District Court rejected.

Due diligence is not an issue. If the 10-fathom curve was a "definite warning of danger", Mail Line, which admittedly sent a vessel to sea with an inoperable fathometer for a passage in that area, clearly failed to exercise due diligence to make the vessel seaworthy.

Similarly, if due diligence was not exercised, the exemptions of Section 4(2) of COGSA, 46 U.S.C. §1304(2) are not available to Mail Line. Neither "negligence of mariners" nor "perils of the seas"

under COGSA relieve from liability a carrier which has failed to exercise due diligence to make its vessel seaworthy. (See cases cited at PCB 85, not discussed or distinguished by Mail Line). An operable fathometer would have readily detected penetration of the 10 fathom curve by the ISLAND MAIL. Accordingly, the failure of Mail Line to make the existing fathometer on the ISLAND MAIL operable was a proximate cause of the stranding, if the 10-fathom curve was "a definite warning of danger" in the area west of Smith Island and Mail Line is liable to Private Cargo.

Respectfully submitted,

DETELS, DRAPER & MARINKOVICH
JONES, GREY, KEHOE, HOOPER & OLSEN
MARTIN P. DETELS, JR.
HARRY B. JONES, JR.

Attorneys for Appellants

Of Counsel:
BIGHAM, ENGLAR, JONES & HOUSTON
JOSEPH J. MAGRATH

Address:
1134 Washington Building
Seattle, Washington 98101

After April 1, 1966:
1310 IBM Building
Seattle, Washington 98101

CERTIFICATE

I hereby certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

MARTIN P. DETELS, JR.
Attorney for Appellants